U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date: **June 7, 2000**

Case No.: **1999-INA-302**

CO No.: **P1998-TX-06293764**

In the Matter of

Eduardo Velez, M.D.,
Employer

In behalf of

Maria Giraldo del Socorro Velez,
Alien

Appearance: G. R. Bodin, Esq.,
for Employer and Alien.

Certifying Officer: J. W. Bartlett
Region VI.

Before: Burke, Huddleston, and Vittone
Administrative Law Judges

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of MARIA DEL SOCORRO VELEZ ("Alien") by EDUARDO VELEZ, M.D., ("Employer") under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer ("CO") of the U.S. Department of Labor ("DOL") at Dallas, Texas, denied the application, the Employer appealed pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U. S. worker availability.

STATEMENT OF THE CASE

On April 21, 1997, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Medical Administrator" for Employer's Pediatric Clinic. (AF 57). The Employer described the job duties as follows:

> Directs administration of Pediatric Medical Office: Administer fiscal operations, such as budget planning, accounting and establishing rates for health care services; directs hiring and training of personnel; negotiates for improvement of and additions to buildings and equipment; directs and coordinates activities of medical, nursing and administrative staff and services.

(AF 57, box 13).[2]

The position was classified as Administrator, Health Care Facility under DOT occupation No. 187.117-010.[3] The required education was completion of high school. No training was specified, but the Employer required two years of experience in the Job Offered or in the Related Occupation of Health Administration. The Other Special Requirement was "Bilingual (English/Spanish)." This was a forty-hour a week job from 9:00 A.M. to 6:00 P.M., with no overtime on unspecified days of the week, at the hourly wage of $33.94 per hour. *Id*., at Items 10-15, and (AF 59-60).[4]

Notice of Findings. Subject to the Employer's rebuttal under 20 CFR § 656.25(c), the

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[2]The Employer is the brother of the Alien, according to the Employer's letter of May 20, 1998. AF 19, 80.

[3]187.117-010 **ADMINISTRATOR, HEALTH CARE FACILITY** (medical ser.) Directs administration of hospital, nursing home, or other health care facility within authority of governing board: Administers fiscal operations, such as budget planning, accounting, and establishing rates for health care services. Directs hiring and training of personnel. Negotiates for improvement of and additions to buildings and equipment. Directs and coordinates activities of medical, nursing, and administrative staffs and services. Develops policies and procedures for various establishment activities. May represent establishment at community meetings and promote programs through various news media. May develop or expand programs or services for scientific research, preventive medicine, medical and vocational rehabilitation, and community health and welfare promotion. May be designated according to type of health care facility as Hospital Administrator (medical ser.) or Nursing Home Administrator (medical ser.). *GOE: 11.07.02 STRENGTH: L GED: R5 M5 L5 SVP: 8 DLU: 89*

[4]The Alien, who is a national of Columbia, graduated high school in 1981. In 1989 she earned a degree conferring the title of "Medico Y Cirujano" or Physician and Surgeon in Cali University in Columbia. This was determined to be the equivalent of a degree of Doctor of Medicine from an accredited educational institution in the United States. AF 65. She worked as a medical administrator from November 1992 to November 1993 in a medical center in Cali. From December 1993 to December 1996 she worked as a sales person in a retail department store in Miami, Florida. She was unemployed and living in the United states from January 1, 1997, to the date of Application in the middle of 1998. The Alien has been living and working in the United States under a B-1 visa.

CO denied certification in the Notice of Findings ("NOF") dated March 25, 1999. (AF 13-17).[5] The NOF cited 20 CFR §§ 20 CFR §§ 656.21(b)(2), 656.21(b)(2)(i), 656.21(b)(2)(1)(A-C), and 656.21(b)(2)(iv), and 656.21(b)(5), and based the denial of certification on the finding at the Employer required job applicants to be fluent in Spanish in order to qualify for the job opportunity. (AF 14). As the foreign language requirement was not normally required for this position in the United States, the NOF said it exceeded the requirements for this occupation in the DOT and was unduly restrictive and violated 20 CFR § 656.21(B)(2)(i)(C). Unless the Employer proved these foreign languages to be a customary requirement for the occupation in the United States or a business necessity.

The NOF then discussed the evidence Employer was expected to file in rebuttal and the corrective action he must take as to this violation.[6] Because the Employer failed to submit documentary evidence to establish that the Spanish language is the sole means of communication within his pediatric clinic or that communication cannot be accomplished in the English language, the NOF directed the filing of such evidence in his rebuttal, noting that his own statement was insufficient proof of this fact. The NOF provided guidance for the filing of persuasive evidence in support of the Employer's position and specifically requested the filing of documentation showing the total number of clients and/or persons with whom he dealt, the percentage of those persons who were unable to communicate in English, the percentage of his business that depended on the foreign language, the way his business would be affected by the absence of such language fluency, and the percentage of time the worker would need to use this foreign language. In addition, the NOF directed the Employer to show how he previously dealt with this segment of his business. In short, the NOF required the Employer to show how the use of the Spanish language was essential to the operation of his pediatric clinic.

Rebuttal. The Employer's April 20, 1999, rebuttal consisted of the Employer's statement and a written argument by his attorney, based on evidence previously provided by the Employer, which concluded that the job requirement in his recruiting advertisement were customary in the health care field and were not tailored to the Alien's qualifications. Employer's argument further contended that the evidence of record showed "a strong business necessity for the [foreign] language requirement." (AF 11). The Employer asserted that his patient list was twenty-seven pages long and said it was proof that a significant number of his patients (82.6%) were Hispanic and a significant number of his patients (60%) spoke only Spanish. (AF 7).

Final Determination. On July 29, 1999, the CO denied certification in the Final

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[5] As a result of Employer's amendments to the Application, it not necessary to discuss the job requirements that were deleted. AF 57 noted the changes initialled on September 10, 1998, and October 27, 1998.

[6] **20 CFR § 656.21(b)** Except for labor certification applications involving occupations designated for special handling (see §656.21a) and *Schedule A* occupations (see §§656.10 and 656.22), the employer shall submit, as a part of every labor certification application, on the Application for Alien Employment Certification form or in attachments, as appropriate, the following clear documentation: ... **(2)** The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements: **(i)** The job opportunity's requirements, unless adequately documented as arising from business necessity: **(A)** Shall be those normally required for the job in the United States; **(B)** Shall be those defined for the job in the *Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs; **(C)** Shall not include requirements for a language, other than English.
20 CFR § 656.21(b)(2)(iv) If the job opportunity has been or is being described with an employer preference, the employer preference shall be deemed to be a job requirement for purposes of this paragraph (b)(2).
20 CFR § 656.21(b)(5) The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

Determination. (AF 3-4). Because the Employer failed to correct the deficiencies that the NOF noted under 20 CFR §§ 656.21(b)(2), 656.21(b)(2)(i), 656.21(b)(2)(1)(A-C), and 656.21(b)(2)(iv), and 656.21(b)(5), the CO concluded that this job opportunity was not clearly open to any qualified U. S. worker. 20 CFR § 656.20(c)(8). In discussing the evidence filed in response to the NOF, the CO said,

> The employer provided a letter to establish the business necessity for the foreign language requirement; however, the employer has not presented acceptable supportive documentation to establish that the job opportunity cannot be performed without the foreign language requirement. The employer failed to submit documentary evidence to substantiate that the Spanish language is the sole means of communication within the company or that communication cannot be accomplished in the English language. Consequently, the requirement for fluency in Spanish remains unsupported and is thereby deemed unduly restrictive.

Id.

Analysis of Employer's led the CO to a reasonable inference that the special requirement of fluency in these foreign languages was not in fact a business necessity under 20 CFR § 656.21(b)(2). Because the job description contained a foreign language requirement that was not supported by proof of business necessity, the CO concluded that the Employer had failed to rebut the finding in the NOF and denied certification as a consequence. (AF 4).

Appeal. On August 18, 1999, the Employer requested administrative/judicial review by BALCA. On October 26, 1999, the Employer filed a appellate brief. Employer said that his rebuttal included his letter of May 20, 1998, listing his patients with Spanish surnames and that his affidavit explained the business necessity for the foreign language requirement. Employer argued that, "The record clearly reflects that the employer provided a patient list consisting of 27 pages as proof that a significant number of patients (82.6%) are Hispanic of which 60% speak only Spanish. Moreover, this is a pediatric practice."[7] Employer concluded that his evidence was substantial proof of the business necessity of this foreign language and that certification should be granted. (AF 1-3).

Discussion

While an employer may adopt any qualifications he may fancy for the workers it hires in its business, it must comply with the Act and regulations when employer seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, the employer's hiring criterion conflicts with the explicit prohibition of 20 CFR 656.21(b)(2)(C), a regulation adopted to implement the relief granted by the Act, which provides that the job offer shall not include the capacity to communicate in a language other than English as a hiring criterion unless that requirement is adequately documented as arising from business necessity.

While the written statement by an employer could be accepted as documentation, if they were reasonably specific and indicated their sources or bases, the CO was not required to accept as credible or true the written statements that this Employer supplied in lieu of independent documentation. In considering them, the CO was required to give the Employer's statement the

[7]The brief alluded to the Employer's statement at AF 05-06, and to the list of 328 patients at AF 89-115.

weight it rationally deserved. Because this Employer's assertions were not supported by factual evidence they were insufficient to carry his burden of proof. *Gencorp*, 1987-INA-659 (Jan.13, 1988)(*en banc*); *see also Our Lady of Guadalupe School*, 1988-INA-313 (Jun. 2, 1989); *Inter-World Immigration Service*, 1988-INA-490 (Sep. 1, 1989); *Tri-P's Corp.*, 1988-INA-686 (Feb. 17, 1989). Although the Employer ostensibly complied with the NOF directions to file evidence supporting his position on the issues raised in the NOF, the facts needed to prove business necessity were not established by his statement, in the absence of a clear connection with tangible data. The evidence in this case failed to demonstrate a frequent and constant need to communicate in a foreign language in business transactions that would be sufficient to affect the performance of the duties of a Medical Administrator under the DOT. *See International Student Exchange of Iowa, Inc.*, 1989-INA-261 (Apr. 30, 1991), *aff'd*, 89 INA 261 (Apr. 21, 1991)(*en banc*)(*per curiam*).

The Employer failed to persuade the CO because his evidence did not support the business necessity that he employ a Medical Administrator who was fluent in the Spanish language. The Panel agrees that the Employer's rebuttal evidence failed to meet its burden of establishing business necessity because his proof is unsupported by either the job description or specific evidence relating to the duties a worker performs in this position. *Analysts International Corporation*, 1990-INA-387 (Jul. 30, 1991).

The Board held in *Information Industries*, 1988-INA-82 (Feb. 9, 1989)(*en banc*), that proof of business necessity under this subsection requires the employer to establish that (1) the foreign language requirement bears a reasonable relationship to the occupation in the context of its business and (2) the use of that foreign language is essential to performing in a reasonable manner the job duties described in its application for alien labor certification. In proving the first prong of this test, it is helpful to show the volume of the employer's business that involves foreign language speaking customers or its business usage of that language. *Coker's Pedigreed Seed Co.*, 1988-INA-48(*en banc*). This is proven with evidence describing the customers, co-workers, or contractors who speak the foreign language and data showing the percentage of the employer's business that involves that language.

Although the second prong invited proof that the Medical Administrator communicates or reads in the Spanish language while performing the job duties, simply proving that a significant percentage of the Employer's customers speaks that foreign language is not sufficient to establish business necessity under this subsection unless the employer also proves the existence of a relationship between the customers' use of that foreign language and the job to be performed.

First, the Employer's rebuttal list of patients with Hispanic surnames was his sole evidence that the patients listed in this category could not speak English. The list of names without more is not persuasive as such evidence is unsupported by proof of such incapacity as to all or any of those patients. *Harlen Sprague Dawley, Inc.*, 1994-INA-484 (May 28, 1996); *also see Pacific Southwest Landscape*, 1994-INA-483 (Apr. 11, 1996).

It is more significant that in describing the job duties that the Medical Administrator would perform, the Employer did not specify any work that required this employee to have contact with persons who spoke only Spanish. Even if the Employer's rebuttal list of patients with Hispanic surnames was found sufficient to prove that they could not speak English, he offered no evidence that any of his patients would have occasion to be in direct contact with the Medical Administrator in the performance of the listed job duties. Specifically, the patients listed were not shown to have a connection with the Employer's budget planning or accounting or with the establishing of rates for the health care services provided by the clinic. Employer did not provide evidence that any patient or other person unable to speak English would be involved routinely in

negotiations for improvement of and additions to buildings and equipment. As the Employer's affidavit asserted that his medical staff was bilingual, no patient or other person unable to speak English would be involved routinely in the hiring and training of personnel, or in the Medical Administrator's direction and coordination of activities of medical, nursing and administrative staff and services. *See Warehouse Food Market*, 1988-INA-366 (Jul. 26, 1989).

It follows that the evidence of record supported the CO's conclusion that the Employer failed to prove that it is not feasible to hire a U. S. worker without the foreign language to perform the job duties specified in his Application. As the CO's denial of certification should be affirmed, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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JOHN M. VITTONE
Chairman, Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.